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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1706

IVAN W. HYATT,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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Questions Presented.

1. By pleading a cause of action under the Federal Employers' Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a *prima facie* case under the Federal Employers' Liability Act by showing that while on a lunch break and in the middle of United States Highway 66 he was struck and injured by a reckless driver?

Statement of the Case.

The petitioner's statement of the case is more argumentative than factual. This is perhaps understandable, since the essential facts which are not in dispute do

not favor his cause against the respondent. In view of the omissions and inaccuracies in the petitioner's statement, however, it becomes necessary to give some account of the facts which are supported by the evidence in the record.

The case involves injuries to a railroad worker who was struck by a reckless driver in the middle of U.S. Highway 66 in Gallup, New Mexico, at the intersection where 8th Street terminates at said highway, on December 8, 1966 at approximately 8:00 p.m.

At the time of the accident a speeding motorist, James Fry, speeding in an easterly direction on Highway 66 in the eastbound lane closest to the center of the highway with his headlight on, struck Mr. Hyatt who was in the process of crossing Highway 66 in a northerly direction, while on his lunch break. Next to petitioner at this time was a fellow worker. [T. 587-588, lines 14-26, 1-15; T. 572, lines 7-20, Vol. III, T. 121-122, lines 11-15, 1.] At approximately the same time, Mr. Carl Hanson, another fellow worker, was standing approximately 100 or 150 feet east of the scene of the accident stepping into the street and then back out of the street and yelling at the petitioner of the approaching speeding vehicle [T. 570-571, lines 17-26, 1; T. 577, lines 15-22.]

Prior to the accident, petitioner had been eating lunch on the south side of U.S. Highway 66 at a cafe known as Virgie's. [T. 294-295, lines 12-14, 9-10, 17-19.] Petitioner had been given his normal 20 minute break for lunch and was on his lunch break when the accident occurred. [T. 294. lines 3-14.]

On the premises of the railroad's yards there was a yard office which was located north of U.S. Highway

66 and there was a walkway from that yard office which the employees used to get to it and to walk to U.S. Highway 66 and parking areas. [T. 613, lines 8-21.] The starting point of the closest fence north of U.S. Highway 66 and on the east side of the walkway was 150 feet. From that point the fence extended to the east. Between that point and the walkway was a parking lot which was also between the railroad tracks and the north edge of U.S. Highway 66. The closest starting point of a fence west of the walkway and north of U.S. Highway 66 was at approximately the westerly edge of the walkway and that continued in a westerly direction. Between that fence and the highway and immediately adjacent to the west of the walkway was a parking area and beyond that to the west a gas station. [T. 262-269.] On the south side of Highway 66 and to the west of 8th Street, starting approximately 100 feet west of 8th Street, were approximately four eating places with the Golden Lion being the most easterly one and the Paramount being the most westerly one. [T. 262-269.] Virgie's Cafe was on 8th Street and about 150 feet south of Highway 66. [T. 262-269.] (See diagram in Appendix A based upon petitioner's Exhibits 6-9 in evidence at the trial.)

Prior to the accident occurring Mr. Fry, the driver of the automobile which struck petitioner, had left the parking area at the Paramount Cafe which was ¼ mile plus from the scene of the accident, which distance was also considered to be a block and a half. [T. 573, lines 8-12; T. 543, lines 12-15.]

The railroad's employees were given a 20 minute break for their lunch period each day that they worked. [T. 294, lines 3-5.] On this lunch break the men would

eat or not eat as they desired. [T. 631, lines 23-26.] Further, the men would eat wherever they desired. Some went home to eat [T. 602, lines 18-20], others ate on the company's premises in a switchman's room [T. 552, lines 9-21, T. 597, lines 18-22], and still others would go across Highway 66 to eat at the cafes on the south side of the street. [T. 560, lines 5-14, 22-25, T. 624, lines 12-18.] Pursuant to a labor-management contract the employees were paid during the time they were on their lunch break. [T. 641, lines 21-25.]

No evidence was admitted at the trial proving the railroad established credit for petitioner at Virgie's Cafe. [T. 420-435.] Furthermore, the traffic on the night of the accident was very light [T. 610, lines 7-13] and the automobile involved in the accident was the only one in the general vicinity of the accident when it occurred and just prior to it occurring. [T. 572, lines 9-13.]

Contrary to petitioner's statement of facts the railroad was not aware that a prior accident had occurred in the area where the petitioner was injured. [T. 643-644, lines 21-24, 1-24; T. 655-656, lines 24-26, 8-12; T. 656, 657, lines 19-23, 2-7; Vol. III, T. 48-49, lines 17-20, 8-15.] The only evidence admitted on this point was hearsay testimony without proper foundation of the plaintiff and one other fellow employee. [T. 392, lines 1-12; T. 565, lines 10-26.] However, the fellow employee had heard that the accident had occurred down near the Paramount Cafe which was ¼ mile or more from the place where the petitioner was injured. [T. 565, lines 10-26.] It should be noted that the California Court of Appeal did not completely address itself to the correctness or incorrectness of the trial court's admitting this evidence at the trial.

ARGUMENT.

1. The Petitioner Was Not Entitled to Have His Case Submitted to a Jury Because He Presented No Evidence of Railroad Negligence.

The petitioner seems to feel that by pleading a purported cause of action under the Federal Employers' Liability Act (FELA) he acquires an absolute and inalienable right to have issues submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals has examined the record to see whether there is any evidence to support his cause. While his present quarrel is with the Court of Appeals and the Supreme Court of California, he would undoubtedly have asserted a similar claim of deprivation had the trial court correctly performed its duty by directing a verdict for the defendant or granting a motion for nonsuit. In short, the petitioner seeks to preclude *any* judicial review of the sufficiency of the evidence.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when *evidence* is produced to sustain his claim.

It is and has always been the function and the duty of the courts to determine whether there is sufficient evidence to be submitted to a jury. And it is well settled that in making this determination, the courts do not invade the province of the jury nor deprive a plaintiff of his constitutional right to a trial by jury. *Com-*

missioners of Marion County v. Clark, 94 U.S. 278, 284; *Baltimore & Ohio R. Co. v. Groeger,* 266 U.S. 521-524; *Gunning v. Cooley,* 281 U.S. 90, 94; *Galloway v. U.S.,* 319 U.S. 372.

The standard to be applied in reviewing the sufficiency of the evidence in casess arising under the Federal Employers' Liability Act has been enunciated in the decision in *Rogers v. Missouri Pacific R. Co.,* (1957) 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493, where the court said, at pages 506,507:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

It has been held repeatedly that there must be more than a mere breath of evidence which tends to show negligence on the part of the railroad for the jury to be left to decide the case. In other words, the weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact. *Chesapeake & Ohio Railway Company v. Burton,* (1954) 217 F. 2d 471, 473; *Gulf, M. & O. R. Co. v. Joiner,* (1947) 29 So. 2d 255, 260.

The Court of Appeals has scrupulously followed these principles in making an appraisal of the proofs offered in this case and has reached the only reasonable conclusion, *i.e., that there was no negligence on the part of the defendant.*

2. The Petitioner Has Not Established a Prima Facie Case Under the Federal Employers' Liability Act by Showing That While on a Lunch Break and in the Middle of U.S. Highway 66 He Was Struck by a Reckless Driver.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured. Therefore, whether the Court of Appeals accurately or inaccurately stated the precise location of the accident is of no consequence. A diagram similar to the one in Appendix A showing the location where the accident occurred was submitted to the Court of Appeals in Appellant's Opening Brief.

The Court of Appeals' opinion is a scholarly analysis of all of the relevant "safe place to work" decisions under the FELA. The analysis of those decisions, which are the *same ones* cited in the Petition for a Writ of Certiorari, except for the Jones Act case, disclosed that all of the cases contained one or both of two vital factors, neither of which existed in the present case:

> "(1) Either the employees were injured on the premises of their employers which the employers had a primary duty to maintain in safe condition; or
>
> (2) They were injured while in the performance of their duties."

The Court of Appeals therefore concluded that a:

> "Synthesis of the safe-place-to-work cases yields the principal that the employers continuing non-delegable duty of due care to provide a reasonably safe place to work is not owed to employees when they are neither on the employer's premises nor in a place where they are required to be in the course of the employer's business."

Contrary to several of the contentions in the Petition, all of the cases did contain one or both of the two vital factors found. Petitioner has in this regard, as he has done throughout the pendency of this lawsuit, before all the courts hearing it, attempted to mislead this court as to the actual facts of those cases in terms of the law expressed therein. A good example of this approach is petitioner's citation to *Ringhiser v. Chesapeake & Ohio Ry. Co.*, (1957) 354 U.S. 901, 1 L.Ed. 2d 268, re the second factor where the facts of the case clearly fall within the first factor. The Court of Appeals' decision saw through petitioner's approach.

In 1959 after the *per curiam* decision without opinion in *Atlantic Coast Line Railroad Company v. Smalls*, (4th Cir. 1954) 216 F.2d 842, cert. granted 348 U.S. 946, *Inman v. Baltimore & O. R. Co.*, 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed. 2d 198, was decided by the United States Supreme Court. In that case the court held that the evidence was insufficient to show negligence in any manner on the part of the railroad. *Inman* involved facts where a railroad employee was injured when struck in the middle of a street by a reckless driving motorist when he was required to stand in the middle of a street at a railway grade crossing to flag traffic even though automatic crossing protection was existent and working at the crossing.

Petitioner's contention, that an injury need not occur at a place of work, would if followed to its ultimate logical conclusion, by itself, lead to preposterous results. For example, an employee may go on his lunch break into a liquor store off of the railroad's premises to determine the prices of some products which he wishes to buy after he has completed his work for that day with

the railroad. During his lunch visit in the liquor store a robbery takes place and the robber shoots and injures the employee. Under plaintiff's theory the railroad would be liable even though the injury did not occur at a place of work but occurred while the employee was on a lunch break during which time collective bargaining agreements required that he be paid and during which time he may have been "on call". Another example directly related to the present case would be the situation where (as one employee did in the present case) an employee goes home to eat during his lunch break and while at home an individual sets the house on fire and the employee is injured in that fire. Can it truly be said that the FELA was intended to cover the employee in such a situation! As liberally as the FELA is interpreted it does not seem that the railroad could or should be held liable under such fact situations and no cases exist going that far.

This Court in *Inman, supra,* recognized these limits in interpreting the FELA. Other courts have also recognized similar limits which are applicable to the present case. In *Simpson v. Texas & New Orleans Railroad Company,* (1962, 5th Cir.) 297 F. 2d 660, the plaintiff was injured while working as a messenger of the railroad. He was furnished by the railroad with a motorcycle which he was required to use in his employment. While using the motorcycle in such employment it became inoperative. Plaintiff was then required to take public transportation by his supervisor to continue his mail route. Upon getting off the bus public transportation in the vicinity of the railroad's depot, while it was raining hard, plaintiff was struck by an automobile while he was in the process of crossing the street. The Appeals Court in *Simpson* upheld a judgment sustain-

ing the railroad's motion to dismiss the Complaint under the Federal Employers' Liability Act on the ground that it failed to state a claim upon which relief could be granted.

California has taken a similar attitude. The recent case of *Smith v. Southern Pacific Company* is in point. This is an unpublished decision rendered by the Court of Appeal—First Appellate District, October 28, 1971.[1] In this case the plaintiff was the administratrix of the Estate of Robert Smith, defendant railroad's employee. The Complaint filed against the defendant alleged that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment. The jury returned a verdict for plaintiff in the sum of $50,000.00 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial. The evidence in *Smith* disclosed that the decedent was a switchman and while employed was struck and killed by an automobile while he was crossing Alameda Street in an industrial part of Oakland for the purpose of apparently opening certain gates of the American Can Company or to use a phone there on defendant railroad's business. Those activities would have come within the duties of the decedent's employment. The decedent was struck by an automobile at a point near the middle of Alameda Street that was speeding, driving without headlights, and whose driver was not watching the road ahead consistently. Fur-

[1]A copy of the decision is attached hereto in Appendix "B"; the California Supreme Court denied a hearing; and, the United States Supreme Court denied a petition for a writ of certiorari 4-3-72.

ther, evidence indicated that there had been railroad employee complaints regarding the danger and frequent accidents in the area.

It is spurious for petitioner to argue that he has been held by the Court of Appeal's decision to have assumed the risk. No such defense was pled by the defendant nor was any instruction given on such a defense at the trial. It is only on appeal that this argument has been made for the first time.

It is Hornbook law that the defendant railroad under the above Act neither insures nor guarantees its employees against the possibility of accident and it can be held liable only if it is found that it failed to perform a duty imposed by law. *Wilkerson v. McCarthy,* (1948) 336 U.S. 53 69 S.Ct. 413, 93 L.Ed. 497, rehearing denied, 336 U.S. 940, 69 S.Ct. 744, 93 L.Ed. 1098. No such duty existed in the present case.

Conclusion.

The decision is clearly correct and is not in conflict with any decision of this court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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